NG CHIN CHAI A

v.

INTER-SPORTS MARKETING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
LEE SWEE SENG JC
[SUIT NO: S-22NCVC-46-2011]
11 APRIL 2011

CIVIL PROCEDURE: *Striking out - Re-filing of action - Res judicata - Whether matter substantially in issue between parties heard and determined in earlier withdrawn action - Whether any prejudice caused - Whether abuse of court's process - Whether O. 1A RHC 1980 overrides technical non-compliance* C

The plaintiff herein in an earlier action against the defendant sued under the name of "Persatuan Badminton Malaysia" for a sum of USD D
305,000 being the balance of a sponsorship sum of USD 900,000 that the defendant agreed to pay the plaintiff under an agreement dated 15 December 2005. Under the agreement, also, the defendant was granted sole and exclusive rights in respect of commercial promotion, advertising, marketing and commercial licensing in agreed territories and E
broadcasting rights of the World Badminton Championship 2007. The defendant applied to strike out the plaintiff's earlier action under O. 18 r. 19(1)(b) and (c) of the Rules of the High Court 1980 for non-compliance with s. 9(c) of the Societies Act 1966 in not naming the public officer through whom he was suing. On the case management F
date, the defendant informed the court of its pending striking out application and the plaintiff sought to amend the name of the plaintiff but the defendant objected to the application. The plaintiff then withdrew the earlier action with liberty to file afresh. The plaintiff subsequently re-filed the present action with the proper name of the plaintiff. The G
defendant now applied to strike out the present action on the grounds of *res judicata*.

Held (striking out the defendant's application):

(1) The court had not decided on the merits of the plaintiff's claim in H
the earlier action or in the defendant's application to strike out the plaintiff's claim in the earlier action (*Tong Lee Hua v. Lee Yoke San*, refd; *Cheong Chee Kwong v. CS Metal Industries (Malaysia) Sdn Bhd*; refd.) Since the matter substantially in issue between the parties in the earlier action had not been heard and determined, the plea of *res judicata* was not available to the defendant. For *res judicata* to apply, I
the point raised must have been decided with sufficient precision, particularity and peculiarity, and not just by a superficial and

peripheral passing remark of a general nature (*New India Assurance Co Ltd v. Karam Singh*, foll; *Dato' Raja Azwane Raja Arif v. Dato' Man Mat & Anor*, refd). (paras 13-16)

(2) The defendant, in the earlier action, had objected to the plaintiff's application to amend the plaintiff's name during the case management. The plaintiff had the option of either arguing on the merits of the amendments sought and risk the application being dismissed with costs, or withdrawing the suit with liberty to file afresh and pay costs to the defendant. The plaintiff chose the second option and a valid one so as to save the court's time and considering too that the defendant had applied to strike out the plaintiff's action after the close of the pleadings and at such a late stage of the proceedings. Any prejudice the defendant might have suffered was ameliorated by the fact that the defendant had not been mistaken as to why it had entered into the agreement dated 15 December 2005 and had paid Persatuan Badminton Malaysia the sum of USD595,000 leaving a balance of USD 305,000 as contended by the plaintiff. (para 17)

(3) The defendant had put the plaintiff in a bind. Should the plaintiff choose to amend the name of the plaintiff to state its public officer's name, the defendant would object to the amendment. Should the plaintiff withdraw its action, the defendant would still object as the defendant contended that the plaintiff should proceed to amend the plaintiff's name. The defendant appeared to be more fixated on avoiding the speedy resolution of the dispute. Any prejudice the defendant suffered could be compensated by costs. The real motive of the defendant was that since the plaintiff had made a mistake in the earlier action in not naming the public officer through whom the plaintiff was suing, the plaintiff was barred from suing the defendant altogether. That could not be the position of the law. (para 18

(4) The new proceeding did not add any new causes of action, matter, issues or facts other than naming the plaintiff with the name of the public officer in whose name the action was brought. The filing of the present action could not be an abuse of the court's process or that *res judicata* was applicable to justify the striking out of the present action. On the contrary, it was the defendant's action that bordered on an abuse of the court's process by capitalising on technical non-compliance to stall the plaintiff's claim. (paras 23 & 24)

(5) In line with O. 1A RHC that in administering any of the rules therein the court or judge should have regard to the justice of the particular case and not only to technical non-compliance of any of the rules therein, the defendant's application should be dismissed with costs. (para 24)

Case(s) referred to:
Andavan v. Thong Nyik Lin [1965] 1 LNS 4 HC ***(refd)***
Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Cheong Chee Kwong v. CS Metal Industries (M) Sdn Bhd [1998] 2 CLJ Supp 452 HC ***(refd)***
Dato' Raja Azwane Raja Ariff v. Dato' Man Mat & Anor [2010] 1 LNS 1036 HC ***(refd)***
Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***
Lee Yoke San v. Tong Lee Hwa & Anor [1977] 1 LNS 58 HC ***(refd)***
Southern Finance Co Bhd v. Lee Geok Lin [1991] 1 CLJ 576; [1991] 3 CLJ (Rep) 766 HC ***(refd)***
The New India Assurance Co Ltd v. Karam Singh [1972] 1 LNS 155 HC ***(foll)***
Tong Lee Hwa & Anor v. Lee Yoke San [1978] 1 LNS 218 FC ***(refd)***
Tong Lee Hua v. Lee Yoke San [1980] 1 LNS 185 PC ***(foll)***

Legislation referred to:
Moneylenders Act 1951, s. 21
Rules of the High Court 1980, O. 1A, O. 18 r. 19(1)(b), (c), (d), O. 92 r. 4
Societies Act 1966, s. 9(c)
Sports Development Act 1997, s. 16

For the plaintiff/respondent - M Mogan Mariappan; M/s Ho Mogan & Nor' Aini
For the defendant/applicant - R Karnan; M/s Ravi, Aida & Partners

Reported by Usha Thiagarajah

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] This judgment answers the question as to whether a defendant can raise *res judicata* when before his application for striking out of the plaintiff's claim was heard, the plaintiff withdrew the claim with liberty to file afresh and then subsequently refiled a fresh claim. Upon being served with a fresh claim the defendant duly applied to have the claim struck out.

Parties

[2] The plaintiff is the Honorary Secretary and the Public Officer of Persatuan Badminton Malaysia, a sports body. The defendant is a company incorporated under the Companies Act 1965. The plaintiff sued the defendant under an agreement dated 15 December 2005 wherein in consideration of the plaintiff giving sole and exclusive right to the defendant with respect to commercial promotion, advertising, marketing and commercial licensing in the territories agreed upon as well as broadcasting rights of the World Badminton Championship 2007, the defendant agreed to pay the plaintiff sponsorship sum of USD900, 000.

[3] The defendant had paid USD595,000 leaving a balance of USD305,000 which is the substantive subject matter of the suit.

Problem

[4] The plaintiff in an earlier suit filed on 3 November 2010, had sued under the name of "Persatuan Badminton Malaysia". The decision to sue in the name of the society was due to the fact that under s. 16 of the Sports Development Act 1997 (SDA), it is provided *inter alia* that any sports body registered under the Societies Act 1966 shall, on the date of coming into force of this Act, cease to be registered under the Societies Act 1966.

[5] The defendant applied in the earlier suit to have the writ and statement of claim struck out under O. 18 r. 19(b) and (c) and/or under the inherent powers of the court under O. 92 r. 4 of the Rules of the High Court 1980 (RHC) for non-compliance with s. 9(c) of the Societies Act 1966.

[6] On the case management date on 4 January 2011 when the matter was called up before the learned judicial commissioner, the defendant's counsel informed the court that he had filed the above application. Whilst no date had then been fixed for the hearing of the application, the plaintiff's counsel informed the court that the point raised by the defendant's counsel is an issue of law and that the plaintiff can always make an application to amend the name of the plaintiff to reflect the name of the public officer that is suing on behalf of the society.

[7] The defendant's counsel indicated that he would be objecting to such an application for amendment. Plaintiff's counsel then decided that it would be prudent for him to withdraw the plaintiff's action against the defendant with liberty to file afresh. The writ and statement of claim were thus struck out and costs of RM200 was ordered by the court for the plaintiff to pay the defendant.

[8] The plaintiff now files a fresh suit and the defendant, having entered a conditional appearance, applied for the writ and statement of claim to be struck out under O. 18 r. 19(1)(b), (c), (d) and/or under the inherent powers of the court under O. 92 r. 4 RHC.

Prayers

[9] The defendant's application in encl. 6 is for striking out the plaintiff's writ and statement of claim under O. 18 r. 19(1)(b), (c), (d) and/or under the inherent powers of the court under O. 92 r. 4 RHC. The brief reasons given are as follows:

(a) This action is filed for a second time;

(b) The plaintiff had earlier commenced the same action against the defendant in Guaman Sivil No: S-22NCvC-11-2011, referred to as the 1st action;

(c) The difference being the name of the plaintiff;

(d) The defendant had filed appearance and defence in the 1st action;

(e) Parties had appeared before the court on a few occasions for case management and parties had finalized agreed facts and issues to be tried;

(f) Bundle of pleadings, bundle of documents, issues to be tried and statement of agreed facts had been filed for the purpose of getting ready the 1st action for trial;

(g) The court had given leave to the defendant to issue a third party notice on 9 December 2010;

(h) The defendant had served the third party notice on the third party, Sports Media Promotions Sdn Bhd;

(i) The defendant had on 28 December 2010 filed an application to strike out the plaintiff's writ and statement of claim on ground that the plaintiff had failed to comply with the mandatory statutory requirement of s. 9(c) of the Societies Act 1966;

(j) On the case management date on 4 January 2011, the plaintiff had withdrawn its action with costs of RM200 to be paid to the defendant;

(k) The defendant states that the plaintiff should have filed a formal application for leave to amend the name of the plaintiff to meet the requirements of s. 9(c) of the Societies Act 1966;

(l) The plaintiff cannot now file a fresh action against the defendant after they had withdrawn the 1st action when it should have applied to amend;

(m) The plaintiff's action is an abuse of the court's process;

(n) The plaintiff's action had wasted the parties' time and caused unnecessary costs to be incurred including that of the court;

(o) The plaintiff is estopped from filing this current action after it had withdrawn the 1st action as the matter is now *res judicata* and the plaintiff is estopped by conduct from filing the current action as the plaintiff should have applied to amend;

(p) The defendant has to incur additional fees and costs to defend this current action; and

(q) The court in the 1st action was ready to fix the trial of the action as all the relevant documents had been filed.

Principles

[10] *The Oxford Dictionary of Law*, 6th edn, Oxford University Press defines "*res judicata*" as follows:

> The principle that when a matter has been finally adjudicated upon by a court of competent jurisdiction it may not be reopened or challenged by the original parties or their successors in interest. Also known as action estoppels. It does not preclude an appeal or a challenge to the jurisdiction of the court. Its justification is the need for finality in litigation.

[11] The Federal Court in *Tong Lee Hwa & Anor v. Lee Yoke San* [1978] 1 LNS 218; [1979] 1 MLJ 24 was confronted with a situation where the Respondent had claimed for work done as a valuer at the request of the Appellants. There was a question as to whether the work was done for the appellants personally or for a company known as Chi Liung & Sons Sdn Bhd or for the estate of Chi Liung. On an application by the respondent to sign final judgment, an order of court was made on 26 March 1973 that the application be withdrawn with liberty to join the other parties involved in the probate suit relating to the estate of Chi Liung. The respondent did not avail himself of this liberty but instead made an application to strike out the defences of the appellants as disclosing no reasonable answer and as being frivolous and vexatious and to sign final judgment. At the hearing of the application,

an order in terms was made (*Lee Yoke San v. Tong Lee Hwa & Anor* [1977] 1 LNS 58). The Federal Court in dismissing the appeal observed on the issue of *res judicata* raised by the Appellants with respect to the order of 26 March 1973 as follows at p. 24:

> At the hearing of the appeal, it was put to counsel for the appellants that to constitute a *res judicata*, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964] AC 993; [1964] MLJ 49, "necessarily and with precision" determine the point in issue, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect, see how he could succeed.

[12] On appeal to the Privy Council in *Tong Lee Hua v. Lee Yoke San* [1980] 1 LNS 185; [1981] 1 MLJ 54 at p. 56 the Privy Council explained thus:

> Nothing could be clearer than that Mohamed Azmi J made no adjudication. Instead, he permitted the plaintiff's summons to be withdrawn so that consideration could be given to the matter of adding others as defendants. Having later decided against that course, it is implicit in the later judgment of Abdul Hamid J that the Plaintiff was guilty of no impropriety in issuing some years later a fresh summons to strike out the defences. The first order clearly constituted no bar to his doing this, and the Federal Court were right in so holding.

[13] The factual matrix in *Tong Lee Hua*'s case (*supra*) is not that dissimilar to the present case. If there the withdrawal is that of the plaintiff's summons for signing final judgment with liberty to add other parties as the defendants and the plaintiff subsequently filed a fresh application to strike out the defence; here it is the plaintiff withdrawing the claim and subsequently filing a fresh claim after the plaintiff had restated the name of the plaintiff by spelling the name of the public officer suing on behalf of Persatuan Badminton Malaysia. In both cases the court had not decided on the merits of the plaintiff's claim in the 1st application of the plaintiff or for that matter the defendant's application to strike out the plaintiff's claim respectively as the case may be.

[14] In a similar vein, in *Cheong Chee Kwong v. CS Metal Industries (M) Sdn Bhd* [1998] 2 CLJ Supp 452 at p. 454 of the headnotes it was summarised as follows:

> The dismissal of the 1st action on a technical defect without any decision on the merits will not bar the 2nd action. The plea of *res judicata* will not be available to the defendant if the matter substantially in issue between the parties had not been heard and determined by the court in the 1st instant.

[15] In *Andavan v. Thong Nyik Lin* [1965] 1 LNS 4 an earlier originating summons had been dismissed on a preliminary point taken, namely, that there was no compliance with s. 21 of the Moneylenders Ordinance 1951 because of the applicant's failure to produce the statement of account when the summons was issued. Upon the applicant making a fresh application, the plea of *res judicata* was raised. His Lordship Ismail Khan J held as follows:

> ... it seems to me that the former judgment proceeded wholly on a technical defect in the proceedings. There was no judicial determination of the matter directly and substantially in issue between the parties, namely, liability of the respondent to the applicant, in the previous action which would bar the present application.

In *The New India Assurance Co Ltd v. Karam Singh* [1972] 1 LNS 155 it was held that since the matter substantially in issue between the parties in the earlier action had not been heard and finally determined by the learned President, the plea of *res judicata* was not available to the respondent in the present action. See also *Southern Finance Co Bhd v. Lee Geok Lin* [1991] 1 CLJ 576; [1991] 3 CLJ (Rep) 766.

[16] I had occasion to deal with this area of law in *Dato' Raja Azwane Raja Ariff v. Dato' Man Mat & Anor* [2010] 1 LNS 1036; [2010] 8 AMR 517 at p. 529 where I opined that for *res judicata* to apply:

> .. the point raised must have been decided with sufficient precision, particularity and peculiarity, and not just by a superficial and peripheral passing remark of a general nature.

[17] When the plaintiff on the case management date sought to amend the name of the plaintiff to state the name of the public officer, the defendant's counsel objected to such an application for amendment. That leaves the plaintiff's counsel two choices: to argue on the merits of the amendments sought and to risk the application for amendment being dismissed with costs or to withdraw the writ and statement of claim with liberty to file afresh and to pay costs to the defendant. The plaintiff's counsel chose the second option and a perfectly valid one at that; both to save the court's time and considering too that the defendant had applied to strike out the plaintiff's claim after the close of pleadings and at such a late stage of the proceeding. If at all the defendant was prejudiced it had taken them quite a long time to realise that. In any event the defendant had no problem filing its defence and even taking out a third party proceeding. Whatever prejudice the defendant said it has suffered is perhaps ameliorated by the fact that the defendant had not been mistaken as to who they had entered into the agreement dated 15 December 2005 and had indeed paid Persatuan Badminton Malaysia the sum of USD595,000 leaving a balance of USD305,000; as contended by the plaintiff.

[18] The defendant seemed to be blowing hot and cold. The defendant had contended that the plaintiff, being not properly named through its public officer, the claim ought to be struck out. When the plaintiff intimated to the court its desire to so amend the plaintiff's name, the defendant objected. By its action and attitude, the defendant's counsel had put the plaintiff's counsel in a bind. It is a case of head I win and tail you lose. Should the plaintiff choose to amend the name of the plaintiff to state its public officer's name, the defendant would object to the amendment. Should the plaintiff withdraw its action, the defendant would still object (if not then, now) as the defendant contended that the plaintiff should proceed to amend the name of the plaintiff. It appears that the defendant is more fixated on avoiding the speedy resolution of the dispute rather than focused on averting further delay by not objecting to the amendments but instead asking for costs. I cannot see any prejudice the defendant had suffered which cannot be compensated by costs. The real motive of the defendant is that since the plaintiff had made a mistake in the 1st action in not naming the public officer through whom the plaintiff is suing, the plaintiff is barred from suing altogether the defendant. That cannot be the position of the law.

[19] Perhaps the learned judicial commissioner had this in mind and so awarded the defendant costs of a mere RM200. Even if the matter had been argued on merits and the court had allowed the defendant's application to strike out the plaintiff's claim because of the lack of the name of the public officer suing on behalf of the society; that too does not prevent the plaintiff from filing a fresh suit, this time, with the plaintiff being properly named. The matter raised by the defendant in striking out the plaintiff's claim is based on a mere technicality that had not prejudiced the defendant in any way seeing that the defendant had gladly proceeded to file its defence and indeed taken out a third party proceeding.

[20] The defendant sought to redeem itself by stating in its affidavit in encl. 9 that what it had objected to was an oral amendment of the Plaintiff's name and not a formal written application for leave to amend. If the defendant had wanted to state that then it must expressly say so through its counsel. I am sure if that had been the message intended, then the plaintiff would not hesitate putting in its formal application for leave to amend the plaintiff's name. It was because of the defendant's substantive and serious objection to the amendment that the plaintiff chose a less risky route-that of withdrawing its claim and paying costs to the defendant and with liberty to file afresh.

[21] The defendant's counsel, in a question by the court, confirmed that he did not object to the plaintiff's withdrawal of its suit and that the withdrawal was with liberty to file afresh.

[22] Counsel for the defendant sought to rely on the Supreme Court's decision in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 where His Lordship Peh Swee Chin FCJ quoted with approval the dicta of Somervell LJ in *Greenhalgh v. Mallard* [1947] 2 All ER 255, 257 as follows:

> ... *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

[23] Here the new proceeding has not added any new causes of action or matter or issues or facts other than naming the plaintiff with the name of the public officer in whose name the suit is brought by Persatuan Badminton Malaysia.

Pronouncement

[24] Taking into consideration all the matters referred to above, I cannot see how the filing of a fresh action by the plaintiff can be said to be an abuse of the court's process or that *res judicata* applies such that the plaintiff's second action should be struck out. On the contrary it is the defendant's action that borders on an abuse of the court's process by capitalising on technical non-compliance to stall and scuttle if possible the whole of the plaintiff's claim. In keeping with the spirit of O. 1A RHC that in administering any of the rules therein the court or a judge should have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules therein, I had no hesitation to dismiss the defendant's application in encl. 6 with costs in the cause.

[25] If it is delay and the dissipation of time that the defendant is distressed over as a result of the plaintiff's 1st action that had been withdrawn, I had proceeded to fix 11 May and 12 May 2011 for the trial of this matter.